THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

U.S. Bank National Association Successor trustee to LaSalle Bank National Association, as trustee under the Pooling and Servicing Agreement, dated as of April 1, 2002, among Asset Backed Funding Corporation, Litton Loan Servicing LP and LaSalle Bank National Association, ABFC Asset Backed Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. **Does the Respondent argue an interpretation of In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) that is at odds with the plain language of that order?**

II. **Does the Respondent's own brief contain statements that show that the circuit court's decision could not have been a proper product of a motion to strike or a motion for judgment on the pleadings?**

III. **Are the things that Appellant failed to do things that would have advanced the prosecution of her counterclaims?**

ARGUMENT

I. U.S. Bank's conception of what the Administrative Order requires and how it operates is at odds with the language of the order.

The Respondent (hereinafter "U.S. Bank") argues that "the circuit court had the inherent power to dismiss Appellant's counterclaims for failure to prosecute for failing to participate in the judicially mandated foreclosure intervention process[.]" (Initial Brief of Respondent p. 9.) U.S. Bank likens the requirements made of mortgage foreclosure plaintiffs under In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01), to mandatory mediation, stating that "failure to participate in it is analogous to failing to participate in mandatory mediation" and thus provided a basis for the circuit court's decision to dismiss the Appellant (hereinafter "Burr")'s counterclaims and strike her affirmative defenses. (Initial Brief of Respondent p. 9.) U.S. Bank's argument in this regard is flawed in at least two respects.

First, U.S. Bank fails to recognize that the Administrative Order makes no requirements at all of someone in Burr's position. It simply provides that *if* a mortgagor defendant in a foreclosure case wants to engage the foreclosure plaintiff in foreclosure intervention discussions, the defendant *may* do so by notifying the plaintiff's counsel in the way described in the order. Id. at 211-12. The rest of the process spelled out in the Administrative Order consists of requirements the order makes of the plaintiff. Id. at 211-14. Compliance with the Administrative Order is mandated *for the plaintiff*. A foreclosure defendant may comply with the order by doing nothing at all, since the order does not require a foreclosure defendant to do

anything. It provides for what may happen if a foreclosure defendant does not do certain things, but it does not require the defendant to do them. Id. U.S. Bank's argument that the circuit court was within the law in dismissing Burr's counterclaims and striking her defenses because of a perceived failure on her part to fulfill requirements under the Administrative Order cannot be correct.

Second, U.S. Bank's argument ignores that the Administrative Order already provides for what happens if a foreclosure defendant does not submit the documents the plaintiff requires to process the defendant for foreclosure intervention: the plaintiff serves a notice of denial of foreclosure intervention, and the case stops being stayed and proceeds. Id. at 212. That happened. (R. pp. ___; Transcript p. 7 ln. 11-14, p. 16 ln. 12-18.) The Alternative Dispute Resolution Rules to which U.S. Bank alludes allow for dismissal of a party's claims for failure to comply with those Rules' mediation requirement (which applies to all parties in the case) in an extreme case because there is a Rule that provides for that as a possible result of noncompliance with the ADR Rules. Rules 6 and 10(b), S.C. ADR Rules. Here, the Administrative Order provides that what is to happen in circumstances like those in this case is just for the case to proceed. In re: Mortgage Foreclosure Actions, 396 S.C. at 212, 213. U.S. Bank, however, wanted more than that, and the circuit court erroneously agreed to give U.S. Bank what it wanted, visiting a draconian punishment on Burr for her failure to meet nonexistent requirements. (R. pp. ____; Order pp. 1-4.) If that is not an abuse of discretion, it is hard to think of what would be. See In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

II. Statements in U.S. Bank's own brief demonstrate that the circuit court's decision could not be a proper product of a motion to strike or a motion for judgment on the pleadings.

a. A certification of mortgagor noncompliance with the Administrative Order is not a pleading.

Despite U.S. Bank's claim that it is, a certification of a mortgagor defendant's noncompliance with the Administrative Order is not a pleading. We know that because we have a Rule of Civil Procedure that states the pleadings that are allowed in the courts of common pleas in South Carolina, as follows:

> Pleadings. There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).

Rule 7(a), SCRCP.

A certification of the sort U.S. Bank contends is a pleading is not listed in Rule 7(a), SCRCP. In fact, the express declaration that "[n]o other pleadings shall be allowed" is dispositive of U.S. Bank's argument. Rule 7(a), SCRCP. Furthermore, a certification of mortgagor noncompliance with the Administrative Order is not *like* what is listed in Rule 7(a). "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial" of the case. Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) (quoting S.C. Nat'l. Bank v. Joyner, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986)). The pleadings allowed by Rule 7(a) do

that. A certification of mortgagor noncompliance with the Administrative Order does not inform anyone of issues for trial in the case; rather, it just brings an end to the stay of the action under the Administrative Order and allows the case to proceed to a resolution of the issues that *are* framed by the pleadings. In re: Mortgage Foreclosure Actions, 396 S.C. at 212, 213.

b. The circuit court used only contentions of fact that were outside the pleadings to reach its decision.

U.S. Bank is wrong to argue that the circuit court's decision was a proper product of a motion to strike or for judgment on the pleadings, since the circuit court expressly based its decision on contentions of fact that are not in the pleadings. (R. pp. ____; Order; Complaint; Answer and Counterclaim; Plaintiff's Answer to Counterclaims; Memorandum in Support of Motion to Reconsider pp. 3-4.) As discussed above, a certification of a mortgagor defendant's noncompliance with the Administrative Order is not a pleading and does not have any of the fundamental attributes of a pleading. The circuit court based its decision on the certification of noncompliance and on U.S. Bank's attorney's mere arguments to the court.

Rule 12(c), SCRCP, provides for a judgment on the pleadings in a proper case, and the standard of whether such a motion should be granted is the same as for a motion under Rule 12(b)(6), SCRCP. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Falk v. Sadler, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000); Fireman's Ins. Co. v. Cincinnati Ins. Co., 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990). Similarly, a motion to strike that challenges a theory of recovery pled by the non-movant is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP. McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

Accordingly, when directed at a counterclaim, such a motion "must be based solely on the allegations set forth in the counterclaim." Charleston County Sch. Dist v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). On such a motion, the trial court may not consider matters outside the allegations of the pleadings. Falk, 341 S.C. at 281; Firemen's Ins. Co., 302 S.C. at 234.

Here, the circuit court *only* based its decision on unpled contentions of fact made by U.S. Bank's counsel. U.S. Bank admits in its brief that its motion was not converted into one for summary judgment. That U.S. Bank contends that Rule 12(c) or 12(f), SCRCP, permitted the circuit court to strike Burr's defenses and dismiss her counterclaims on the basis of an unpled mootness defense and assertions of fact that are not contained in the pleadings cannot withstand the most cursory logical scrutiny.

c. The circuit court did what a court is never permitted to do.

The circuit court did what a court is never permitted to do: end a party's claims and defenses solely on the basis of unsupported and unsworn contentions of fact made by the other party's lawyer. As discussed above, what the circuit court was really doing was not deciding a motion directed at the sufficiency of Burr's pleading. Nor was it making a decision on the basis of some factual record: no testimony, by affidavit or otherwise, was served with or ever offered in support of the motion. (R. pp. ____; Exhibits to Motion to Dismiss Counterclaims and to Strike Defenses; Memorandum in Support of Motion to Reconsider p. 2; Transcript p. 14 ln. 11-15, p. 16 ln. 23-24, p. 19 ln. 4-5.)

III. The things Burr failed to do are not things that would have advanced the prosecution of her counterclaims.

Everything U.S. Bank complained of in its motion that Burr failed to do were things that would have assisted with and provided information for use in settlement negotiations. All of them were things that might have helped this case to be resolved through foreclosure intervention, which would be a resolution under which *neither* party would prosecute any claims in this case. (R. pp. ____; Order; Motion to Dismiss Counterclaims and to Strike Defenses; Transcript p. 5 ln. 10 – p. 12 ln. 25, p. 18 ln. 9 – p. 19 ln. 3, p. 19 ln. 22 – p. 20 ln. 4.) None of them would have done anything to advance the prosecution of her counterclaims. For the circuit court to equate Burr's failure to do those things with a failure to prosecute her counterclaims is on its face a misconception of the law, and to end her claims and defenses as a result of that misconception was a plain abuse of discretion.

CONCLUSION

U.S. Bank's arguments are incorrect, as was the circuit court's ruling. This Court should reverse decision of the circuit court and remand this case.

Respectfully submitted,

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August 28, 2013

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PROOF OF SERVICE

I certify that I served the foregoing initial reply brief of Appellant by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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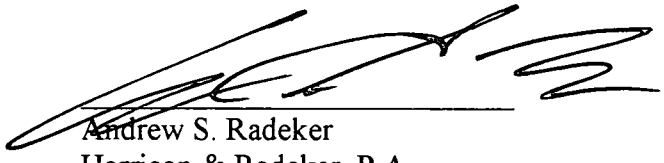

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